

IN THE COURT OF APPEALS OF IOWA

No. 4-562 / 93-1538

FILED

FEB 28 1995

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JAMES J. HENSLEY, III,

Appellant.

Appeal from the Iowa District Court for Warren County,
William H. Joy, Judge.

James J. Hensley, III, appeals the judgment and sentence entered upon his conviction, following a jury trial, of second-degree theft in violation of Iowa Code sections 714.1(4) and 714.2 (2) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Kevin Parker, County Attorney, for appellee.

Heard by Donielson, C.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

DONIELSON, C.J.

Defendant James J. Hensley, III, appeals his conviction of theft in the second degree. He contends the trial court erred in admitting evidence obtained in violation of his constitutional right to counsel and there was insufficient evidence to support a guilty verdict. Upon our review of the parties' arguments, the record and the applicable law, we find the defendant's sixth amendment right to counsel was violated, and statements made by the defendant to a law enforcement officer were improperly admitted. However, we find this constitutional error was harmless beyond a reasonable doubt as there was other overwhelming evidence to support the guilty verdict.

On May 14, 1993, Deputy Roger Lettington was dispatched with respect to an outstanding arrest warrant for the defendant.¹ The deputy observed the defendant and the defendant's friend, Robert Krebs, leaning on a motorcycle that was sitting in an intersection. As Deputy Lettington approached the defendant and Krebs, they began to rapidly walk away with Krebs pushing the motorcycle. Lettington ordered them to stop and the two returned to his patrol car. The deputy then noticed the ignition of the motorcycle had been tampered with and the motorcycle did not have a license plate. As the deputy called for a back-up unit, the defendant fled and Krebs attempted to

1. The warrant was unrelated to the motorcycle theft now at issue on appeal.

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push the motorcycle to his residence. A subsequent check on the vehicle identification number revealed the motorcycle was stolen. Following an investigation the defendant was arrested and charged with the second-degree theft of the motorcycle.

At his initial appearance on June 12, 1993, the defendant requested the appointment of counsel. He completed an application for appointment of counsel and returned it to the jailer. On June 14 the trial court technician received the application, and on June 15 counsel was appointed to represent the defendant.

Deputy Lettington questioned the defendant at the jail on June 15, 1993. The deputy informed the defendant of his rights and asked him if he had spoken with an attorney regarding the charge. The defendant responded he had not. At this time neither the defendant nor Deputy Lettington knew counsel had been appointed to represent the defendant.

The deputy questioned the defendant about whether he was aware the motorcycle was stolen. At trial the deputy testified as to the defendant's responses.

Q. And did you ask Mr. Hensley whether or not he knew it was stolen? A. I asked him that, yes.

Q. And what was his response to you? A. He stated that -- during the questioning I asked him if he felt due to the fact that the motorcycle's ignition switch had been tampered with and the license plate was missing felt it was stolen, and he stated that he felt it was stolen, yes.

. . . .

Q. Mr. Hensley indicate to you where he thought the motorcycle came from? A. He indicated that he had no idea where it came from. He stated that he felt it was probably stolen. However, he indicated that he wasn't actually -- wasn't the one who actually stole it.

The defendant sought to suppress the statements he made to Deputy Lettington at the jail. He argued that at the time of the questioning his constitutional right to counsel had attached and the interrogation had occurred in violation of this right. The defendant's motion was denied and the State was allowed to present the statements to the jury.

The constitutional right to counsel attaches at or after the initiation of adversary proceedings against a defendant. State v. Evans, 495 N.W.2d 760, 764 (Iowa 1993). At no point in its brief does the State dispute the defendant's sixth amendment right to counsel had attached prior to Deputy Lettington's questioning on June 15. See State v. Jackson, 380 N.W.2d 420, 424 (Iowa 1986) (sixth amendment right to counsel had attached where defendant had been arrested, confined and initial appearance had been held). Nor does the State argue the defendant effectively waived this right by initiating the interrogation. See, e.g., State v. Newsom, 414 N.W.2d 354, 359 (Iowa 1987) (accused may waive right to counsel by initiating conversation with police).

Under these circumstances no purpose would be served by an extensive analysis of the scope or application of the

sixth amendment. We find the defendant's sixth amendment right to counsel was violated and the statements he made to the deputy should have been suppressed. The dispositive issue in this appeal is whether this constitutional error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967). "In order for a constitutional error to be harmless, the court must be able to declare it harmless beyond a reasonable doubt." State v. Deases, 518 N.W.2d 784, 791 (Iowa 1994). Where the State has otherwise overwhelming evidence of a defendant's guilt, the erroneous admission of a defendant's incriminating statement may be harmless beyond a reasonable doubt. See, e.g., Milton v. Wainwright, 407 U.S. 371, 372-73, 92 S.Ct. 2174, 2175-76, 33 L.Ed.2d 1, 4 (1972); State v. Craney, 347 N.W.2d 668, 674-676 (Iowa 1984), cert. denied, 469 U.S. 884 (1984).

We believe the erroneous admission of the defendant's statements to the deputy was harmless beyond a reasonable doubt because of the other overwhelming evidence of the defendant's guilt. This evidence includes:

- 1) Witnesses Babowitch, Krebs and Deputy Lettington observed the defendant in possession of a motorcycle that did not have a license plate and which had an ignition which had been damaged allowing its operation without a key;
- 2) Witnesses Babowitch, Swartz and Krebs testified as to the defendant's use of the motorcycle as an operator and/or passenger;
- 3) Witnesses Babowitch and Krebs testified as to the defendant's statements that the motorcycle had been borrowed;

4) Witness Babowitch testified the defendant told her to mind her own business when she asked from whom the motorcycle had been borrowed;

5) Witness Babowitch testified the defendant told her he and Krebs had thrown the motorcycle's license plate onto the roof of a shopping mall;

6) Police recovered the motorcycle's license plate from the roof of a mall;

7) Although the defendant had told others the motorcycle was borrowed, witness Taylor testified he had a phone conversation with the defendant and Krebs in which the defendant indicated he had a motorcycle for sale; and

8) The defendant fled the scene after Deputy Lettington had stopped the defendant and Krebs and noticed the damaged ignition and missing license plate on the vehicle.

There was overwhelming evidence of the defendant's guilt, and he was not prejudiced by the erroneous admission of the statements made in violation of his sixth amendment right to counsel. We affirm his conviction.

AFFIRMED.

Cady, J., concurs; Schlegel, S.J., dissents.

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SCHLEGEL, S.J.

I respectfully dissent.

There is no dispute of the fact that the defendant's constitutional right to counsel under the sixth amendment to the United States Constitution was violated. There was other evidence of defendant's implication in the theft. There was no direct evidence of the defendant's guilt in the theft of the motorcycle. All evidence set out by the majority was circumstantial. Put another way, there is not other overwhelming evidence of defendant's guilt. The majority apparently disagrees with that conclusion, saying "[T]he erroneous admission . . . was 'harmless beyond a reasonable doubt' because of the other overwhelming evidence of the defendant's guilt."

The majority's decision correctly points out that in order for error of constitutional magnitude to be harmless, "the court must be able to declare it harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710-11 (1967).

The Iowa Supreme Court applied the Chapman standard in State v. Lanphear, 220 N.W.2d 618, 622 (Iowa 1974). In that case the court said:

In regard to harmless constitutional error the 'overwhelming evidence of guilt' approach has been discarded and the inquiry focused on "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

The authorities still hold to that view, although constitutional error is sometimes found to be harmless beyond a reasonable doubt on other grounds.

The majority cites Milton v. Wainwright, 407 U.S. 371 372-73, 92 S. Ct. 2174, 2175-76, 33 L. Ed. 2d 1, 4 (1972); and State v. Craney, 347 N.W.2d 668, 674-676 (Iowa 1984), cert. denied, 469 U.S. 884 (1984).

In Milton v. Wainwright, the error in admitting a confession was declared harmless, not because there was overwhelming other evidence of the defendant's guilt - although there was. That error was declared harmless because there were three other unchallenged confessions to the same effect. That error did not prejudice the defendant. It cannot be said that the admission of the fourth confession, though error, on the basis of a reasonable possibility contributed to the conviction.

Once again, in Craney, the exact evidence complained of was properly in the record without objection. The erroneous evidence was cumulative to other evidence properly in the record. The admission of the erroneous evidence was without prejudice. That is quite different from the situation where "other overwhelming evidence" is relied upon to find that error is harmless. In Craney the court was faced with identical evidence to the erroneous evidence. Neither Wainwright nor Craney are appropriate authority for the majority's position in this case. Neither case was decided on the ground that there was overwhelming other evidence of the defendants' guilt.

To decide this case on the basis that there was overwhelming evidence of defendant's guilt in addition to the erroneously admitted statements, is to assume the function of the jury, where the other evidence of his guilt, as outlined by the

majority is anything but clear. To pronounce it overwhelming evidence of guilt, and upon it, declare the defendant guilty is a clear usurpation of the jury's function. As stated by Justice McCormick in his dissent in State v. Trudo, 253 N.W.2d 101 (Iowa 1977):

The State's evidence is not "overwhelming" unless the jury chose to believe it The court has put itself in the place of the jury. In doing so, the court has denied defendant the benefit of the presumption of innocence, the effect of his plea of not guilty, and his right to have the jury decide whether the State has met its heavy burden . . .

I do not believe the majority can properly say that there is no reasonable possibility that the evidence (the statement) complained of might have contributed to the conviction of the defendant. The requirement for finding that error of constitutional magnitude was harmless beyond a reasonable doubt has not been met. The case should be reversed for a new trial.